

EXHIBIT 2

108:03:12

UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

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MARK C. SCARSI, U.S. DISTRICT JUDGE

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NETLIST, INC.,)
)
Plaintiff,)
)
vs.)
) 8:20-CV-993-MCS
SAMSUNG ELECTRONICS CO.,)
LTD.,)
)
Defendant.)
)
)

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REPORTER'S TRANSCRIPT OF JURY TRIAL

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VOLUME II

17

Los Angeles, California

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Wednesday, May 15, 2024

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111:43:56 A. That is correct.

211:43:57 Q. At any point in time, anywhere in this contemporaneous
311:44:03 document, did Samsung ever say the supply obligation was
411:44:07 limited to NVDIMM-P for the JDP?

511:44:11 A. No.

611:44:14 MR. SHEASBY: Pass the witness.

711:44:15 THE COURT: Any recross?

811:44:16 MR. SNYDER: Yes, Your Honor, just a couple of

911:44:19 questions.

1011:44:19 RECROSS-EXAMINATION

1111:44:21 BY MR. SNYDER:

1211:44:21 Q. Mr. Hong, you referred a few moments ago to a product
1311:44:24 called EMMC. Do you recall that?

1411:44:27 A. Yes.

1511:44:27 Q. EMMC was not used for an NVDIMM-P product, correct?

1611:44:35 A. That is incorrect. It is used for NVDIMM-P product.

1711:44:39 Q. EEMMC was not used for the jointly developed product
1811:44:44 under the JDLA, correct, sir?

1911:44:46 A. That is incorrect. It is specifically used for the joint
2011:44:50 develop product.

2111:44:51 Q. Netlist did not -- as I think you testified earlier
2211:44:55 today, Netlist did not produce -- Netlist and Samsung never
2311:45:01 got to the productization stage of the NVDIMM-P project,
2411:45:06 correct, sir?

2511:45:06 A. Sir, we had the product that we were showing Samsung.

114:14:05 be.

214:14:05 Q. Now, you said you had a call with Mr. Knuth where he told
314:14:10 you to come up with your best guess or just give you a name,
414:14:12 right?

514:14:12 A. Yes.

614:14:13 Q. And did you record the substance of that call in notes?

714:14:16 A. Yes, we did.

814:14:17 Q. Could you look at the document in front of you? This is
914:14:22 Exhibit IX13.

1014:14:24 A. Yes, I'm looking at it.

1114:14:25 Q. Are these the notes involving your conversation with
1214:14:30 Neal?

1314:14:30 A. Yes, it is. It's our weekly update call.

1414:14:35 MR. HARBOUR: Your Honor, I move to admit this
1514:14:37 exhibit into evidence.

1614:14:39 THE COURT: What's the exhibit number?

1714:14:40 MR. HARBOUR: It's IX13. This is not in the exhibit
1814:14:45 list, but I'm reintroducing it for purposes of rehabilitating
1914:14:51 the witness.

2014:14:51 THE COURT: What will be the exhibit number be in
2114:14:53 evidence? Do you have a number -- do you have a regular
2214:14:55 exhibit number?

2314:14:58 MR. HARBOUR: It will be Exhibit 999.

2414:15:01 THE COURT: 999. Okay.

2514:15:03 Any objection to 999 coming in evidence?

114:15:06 MR. FEINSTEIN: Your Honor, this wasn't on the
exhibit list. It wasn't disclosed to us. We object on that
ground.

414:15:11 THE COURT: Okay. Counsel, why wasn't this on the
exhibit list?

614:15:14 MR. HARBOUR: Well, this exhibit is being
introduced -- it was not an exhibit we were seeking to
introduce affirmatively. I'm bringing it up because they
attempted to impeach the witness on his cross-examination,
and I would like to introduce this exhibit to rehabilitate
the witness.

1214:15:28 So it was not an exhibit we were intending to bring
up in our case in chief, it's just an exhibit that came up
because of the line of questioning just introduced.

1514:15:36 THE COURT: Let me talk to the lawyers at side bar.
(At the bench.)

1714:15:48 THE COURT: So counsel is indicating he's bringing
this in to rehabilitate the witness. Do you have a response
to that?

2014:15:54 MR. FEINSTEIN: This document wasn't on the exhibit
list. And it's -- I'm not even aware it was produced in this
litigation.

2314:16:01 MR. HARBOUR: I don't believe it was. And again,
the only reason why I'm bringing this up is because they
tried to impeach him, and he mentioned these meeting notes.

114:16:07 And I wanted to show that he did not make up these meeting
notes. He has documentary evidence on it.

314:16:12 THE COURT: It wasn't produced then, right?

414:16:13 MR. HARBOUR: It was not produced, no.

514:16:15 THE COURT: Why wouldn't it have been produced?

614:16:16 MR. HARBOUR: I don't know. I wasn't counsel at the
714:16:18 time. I don't know if it was responsive to a particular
814:16:21 request.

914:16:22 THE COURT: I can't see how it would not be
1014:16:25 responsive to a discovery response.

1114:16:28 First of all, it doesn't come it because it wasn't
1214:16:30 produced.

1314:16:30 And second of all, I've got a concern about why
1414:16:32 this -- why this wasn't produced. And so I would ask counsel
1514:16:35 to go back, dig into that, and let me know tomorrow why this
1614:16:42 wasn't produced.

1714:16:43 MR. HARBOUR: We can do that, Your Honor. I will
1814:16:45 say that counsel of record at the time is not counsel --

1914:16:47 THE COURT: I don't care who counsel of record was,
2014:16:50 and anything like that, but I do care if there was documents
2114:16:53 that you've got in your back pocket that haven't been
2214:16:56 produced that appear relevant. That seems to be a pretty big
2314:16:59 discovery violation to me. One that might merit sanctions.
2414:17:02 So I just want you -- before I go that far I want to hear a
2514:17:05 little bit more about it.

114:17:06 But this will not come in.

214:17:08 MR. HARBOUR: Thank you, Your Honor.

314:17:09 (In open court:)

414:17:09 BY MR. HARBOUR:

514:17:21 Q. Mr. Park, you also were asked -- or spoke with opposing
614:17:25 counsel about whether or not Netlist had ever told -- or
714:17:30 whether I think it was ever you personally, had ever told
814:17:33 Samsung that they were in breach of the agreement. And
914:17:36 counsel was very particular about the word choice, used the
1014:17:40 very specific word "breach." Do you recall that?

1114:17:41 A. Yes, I do.

1214:17:43 MR. HARBOUR: Could we pull up Exhibit 152, please?

1314:17:43 BY MR. HARBOUR:

1414:17:55 Q. This was a document that we looked at earlier, and I
1514:17:57 think you even opposing counsel showed you. Do you remember
1614:18:00 that?

1714:18:01 A. Yes.

1814:18:06 Q. And I want you to look at that second paragraph in this
1914:18:10 e-mail. This is an e-mail that was written by Paik Ki Hong.
2014:18:15 Do you recall that?

2114:18:15 A. Yes, I do.

2214:18:16 Q. And remind us who Paik Ki Hong was.

2314:18:18 A. He was our VP of operations and responsible for
2414:18:21 procurement.

2514:18:22 Q. And I believe this is the e-mail we discussed that he

114:27:27 A. Which terms? I'm sorry.

214:27:28 Q. The ones on the screen, joint development project and

314:27:31 developed product.

414:27:31 A. Oh, yes.

514:27:32 Q. Now, if Section 6.2, Samsung's supply obligation were

614:27:38 limited to the JDP or the developed product, would

714:27:42 Section 6.2, Samsung's supply obligation have had any value

814:27:49 to Netlist?

914:27:49 A. No, none whatsoever, because under this provision in

1014:27:53 Section 2.1, Samsung retained the right to cancel or suspend

1114:27:59 the joint development at any time and for any reason.

1214:28:01 Q. Were you involved in reviewing all of the drafts of the

1314:28:07 agreement that went back and forth between the parties before

1414:28:09 it was signed?

1514:28:10 A. Yes, I was.

1614:28:11 Q. Did any of the drafts of the agreement or any of the

1714:28:16 preceding documents, either from Samsung or Netlist, ever

1814:28:19 limit the supply clause to the joint development project or

1914:28:22 the developed product?

2014:28:25 A. No, that was never proposed.

2114:28:25 Q. So let's talk about what led to the final agreement.

2214:28:29 Prior to Netlist entering into the JDLA, were you

2314:28:33 involved in any presentations to Samsung regarding Netlist's

2414:28:38 patents?

2514:28:38 A. I was.

114:32:27 small company like Netlist.

214:32:29 There was some initial -- or some additional back
314:32:33 and forth to try to address that concern. We made at least
414:32:36 one proposal in that regard.

514:32:38 Ultimately, Samsung said that rather than make sort
614:32:42 of a large payment like that, they offered supply and
714:32:46 products instead.

814:32:47 Q. I'm going to pull up previously admitted Exhibit 101.

914:32:50 Do you recognize this document?

1014:32:51 A. I do.

1114:32:53 Q. What is it?

1214:32:53 A. This was the e-mail communicating that proposal from
1314:32:58 Samsung to us.

1414:32:58 Q. Did you see it at the time that it was sent?

1514:33:00 A. I did.

1614:33:01 Q. And what is the upshot of this e-mail?

1714:33:03 A. The upshot is, as I said, Samsung offered to supply NAND
1814:33:08 and DRAM, amongst other things. Samsung said that it would
1914:33:13 enable Netlist to grow its business, and it also said that it
2014:33:17 would enable us to envision our -- it would enable our vision
2114:33:23 of being a products company.

2214:33:24 Q. What was Netlist's reaction to Samsung's counter proposal
2314:33:28 to supply NAND and DRAM on Netlist's request in exchange for
2414:33:34 a license to its patents?

2514:33:35 A. We liked the idea. I mean, the idea or the commitment to

114:33:39 supply NAND and DRAM could be incredibly valuable to
214:33:43 Netlist's business.

314:33:44 For example, you know, in times of worldwide
414:33:47 shortage, having a committed supply of products could be
514:33:51 extremely valuable to the company. And particularly given
614:33:54 our history of trying to get supply from Samsung when they
714:33:56 had cut us off in the past and it had damaged our business,
814:34:00 having that commitment could be really valuable to us.

914:34:03 Q. Now, if Section 6.2, Samsung's supply obligation were
1014:34:06 limited to only the joint development project or the
1114:34:10 developed product, how if at all would that relate to the
1214:34:13 Samsung e-mail we are looking at the screen stating supply
1314:34:17 obligation would enable Netlist's vision of being a products
1414:34:19 company?

1514:34:20 A. I would have rendered this e-mail completely nonsensical,
1614:34:25 because if it had to have been tied to the joint development,
1714:34:30 they could have canceled that at any point for any reason and
1814:34:34 cut off that supply.

1914:34:35 Q. So you started with the \$85 million plus an ongoing
2014:34:41 royalty on Samsung's sales offer by Netlist and ultimately
2114:34:45 negotiated the final Section 6.2. What happened in the
2214:34:48 middle of all of that?

2314:34:48 A. Yeah, there was -- we negotiated for about six months. A
2414:34:52 lot of the terms changed, pretty typical in a negotiation
2514:34:58 like this, and particularly when dealing with a large foreign

115:11:29 other than to the extent someone translated them for you,
215:11:32 correct?

315:11:32 A. Correct.

415:11:37 MR. SNYDER: Now, could we bring up Exhibit 101,
515:11:39 please?

615:11:39 BY MR. SNYDER:

715:11:41 Q. You testified earlier about this e-mail from Mr. Kenny
815:11:46 Han.

915:11:48 Thank you, Dorian.

1015:11:52 Do you recall that, sir?

1115:11:53 A. I do.

1215:11:54 Q. This is previously admitted.

1315:11:56 A. I do.

1415:11:56 Q. And I believe that you pointed to this e-mail as the
1515:11:59 point at which Samsung proposed that it would include a broad

1615:12:04 supply agreement in an agreement with Netlist, correct?

1715:12:08 A. I don't know if this was the very first mention of

1815:12:14 supply, but, yes, it was a very clear suggestion of supply.

1915:12:18 Q. Now, you did not discuss with the jury during your
2015:12:21 testimony the actual term sheet that came with this e-mail,
2115:12:24 did you, sir?

2215:12:25 A. I mentioned it in passing.

2315:12:28 MR. SNYDER: Could we bring up exhibit -- admitted
2415:12:30 Exhibit 102?

2515:12:30 BY MR. SNYDER: